1893
SEP. 28.

APPEL-
LATE
CIVIL.

18 B. 547.

18 B. 547.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Bayley.

KRISHNAJI NARAYAN POKSHE (*Original Plaintiff*), *Appellant v.* THE MUNICIPALITY OF TASGAON (*Original Defendant*), *Respondent.** [28th September, 1893.]

Municipality—District Municipality—Bombay Act VI of 1873, *s.* 33 †—*Building—Damages.*

Plaintiff having built a new wall on the site of an old wall including the old foundations, the Municipality pulled the wall down. Plaintiff thereupon sued the Municipality for damages. The Judge rejected the claim for damages.

Held, that the building of a new wall on the site of the old wall including the old foundations was not an addition to the existing building within the meaning of s. 33 of the District Municipal Act (Bombay Act VI of 1873). The Municipality was, therefore, liable in damages for any expenses which the plaintiff was put to by their pulling down the wall.

[R., 22 B. 230 (233); 23 B. 248 (249); Cons., 6 Ind. Cas. 431=6 N. L. R. 53 (62); D., 2 Bom. L. R. 572 (577).]

[548] SECOND appeal from the decision of J. W. Walker, District Judge of Satara.

This action was instituted by plaintiff Krishnaji Narayan Pokshe against the Municipality of Tasgaon in the Satara District to recover Rs. 48 on account of damages for pulling down a wall rebuilt by the plaintiff on the site of the old wall including the old foundations, and for an injunction restraining the defendant from obstructing the plaintiff in rebuilding the wall.

The defence of the Municipality was that the plaintiff had encroached upon the ground belonging to the defendant; that the defendant did not cause any damage to the plaintiff.

The Subordinate Judge found that the plaintiff's wall, which was partly pulled down by the Municipality, stood on its old foundation, and

* Second Appeal No. 308 of 1892.

† Section 33 of the District Municipal Act (Bom. Act VI of 1873):—

33. *Clause* 1.—Before beginning to erect any building, or to alter externally, or add to any existing building, the person intending so to build, alter or add, shall give to the Municipality notice thereof in writing, and shall furnish to them, if required to do so, a plan showing the levels at which the foundation and lowest floor of such building are proposed to be laid by reference to some level known to the Municipality, and all information they may require regarding the limits, design and materials of the proposed building, and the intended situation and construction of the drains, sewers, privies and cesspools (if any) to be used in connection therewith.

Clause 2.—Within one month after receiving such notice, the Municipality may in writing issue such orders not inconsistent with this Act as they think proper with reference to such building. If the Municipality fail to issue written orders, whether of approval or otherwise, with reference to such building within the said period, the person originally giving notice may proceed to erect the building in question in the manner proposed by him to the Municipality, provided such building be in accordance with the provisions of this Act.

Clause 3.—If such building be begun or made without the notice or without affording the information above prescribed, or in any manner contrary to the legal orders of the Municipality issued within the period aforesaid, or in any other respect contrary to the provisions of this Act, the person so building shall be liable to the penalty hereinafter provided, and the Municipality may, by written notice, require such building to be altered or demolished as they may deem necessary.

1893
SEP. 28.

APPELLATE CIVIL.

18 B. 547.

that the plaintiff did not appropriate any municipal ground. He, therefore, allowed the claim with interest at nine per cent. on Rs. 48.

On appeal by the defendant the Judge found that the plaintiff was entitled to rebuild the wall as it stood when it was partly removed by the defendant, but that he was not entitled to damages. He, therefore, varied the decree. In his judgment he made the following remarks.—

"The only other point is whether plaintiff should be allowed any damages for the pulling down a part of the wall which he [549] is now held entitled to rebuild. He was required to pull down the wall, by a notice of the Municipality, Ex. 54, under s. 33, cl. 3, of the Bombay District Municipal Act, on the ground that the wall had been made without due notice to the Municipality. Under s. 33, notice must be given 'before beginning to erect any building,' and the amended s. 3 provides that the word 'building' shall include a compound wall such as that in dispute. The High Court have held that a person who, without giving notice, merely re-erects on the same foundation a *part* of a wall which has fallen down does not contravene the provisions of s. 33 (Cr. Rg. No. 63 of 30th August, 1888, *Crown* v. *Tipanna*). But here the wall rebuilt was the whole wall along its entire length, and it is clearly necessary that notice should first be given in such a case to prevent disputes as to the original site. The portion of the wall which the Municipality held was an encroachment, was subsequently removed. It appears that the plaintiff was convicted for building without notice, and the conviction was set aside by the High Court, but the grounds for the decision do not appear. Under s. 33 the Municipality was entitled to remove the whole wall; the first notice was not strictly legal, as it required the wall to be removed within 24 hours, while the period under s. 75 of the Act should have been not less than 3 days or more than one month. This defect might prevent the conviction of the accused, or the power of the Municipality to recover the cost from the plaintiff, but would not bar the right of the Municipality to remove the wall as having been built without notice. In any case, the plaintiff has only himself to blame for disobeying the law, and he cannot recover damages. He has also made an unfounded claim to ground outside the wall. There is no question now raised as to the amount of the damages awarded by the lower Court if plaintiff were held entitled to recover damages. I should add that, in my opinion, there was no occasion for awarding interest on the sum awarded by the Court.

"I amend the decree of the lower Court and direct that the defendants be restrained from obstructing the plaintiff in rebuilding his wall to the width of one foot or up to the line at [550] which the wall stood when it was partly removed by defendants."

Plaintiff preferred a second appeal.

Mahadeo B. Chaubal for the appellant (plaintiff):—We rebuilt our wall on the old foundation; the Municipality was, therefore, wrong in pulling it down. The lower Court disallowed our claim for damages on the ground that we have not given notice of our claim to the Municipality. This is a wrong view of the law on the point. We erected the wall on the old foundation, and in such a case no notice is necessary.

The District Municipal Act requires that a notice should be given in the case of a new building. It has been held that in a case like the present no notice need be given under s. 33 of the Act—Criminal Review No. 421 of 1890, decided on the 6th February, 1890. The Municipality

1893
SEP. 28.
APPELLATE CIVIL.
18 B. 547.

had, on a former occasion, criminally prosecuted us, and even in that matter this Court held that no notice was necessary.

There was no appearance for the respondent (defendant).

ORDER.

SARGENT, C. J.—Both the Courts have found that the new wall was built on the sight of the old wall including the old foundations. Section 33 of Act VI of 1873, therefore, did not apply, as in point of fact according to the above finding there was no addition to any existing building. The Municipality would, therefore, be liable in damages for any expense the plaintiff may have been put to by their pulling down his wall. Those damages have been assessed at Rs. 48 by the Subordinate Judge, and no objection was taken to the amount in the lower Court of appeal by either party. We must, therefore, for clearness sake, amend the decree of the Court below by adding the words "on its old foundations" after the words "in rebuilding his wall" and also direct that the defendant do pay plaintiff Rs. 48. The plaintiff to have his costs throughout.

Decree amended.

---

18 B. 551.

[551] ORIGINAL CIVIL.

Before Mr. Justice Farran.

THE ADVOCATE GENERAL OF BOMBAY (*Plaintiff*) *v.* BAI PUNJABAI AND OTHERS (*Defendants*).* [18th June and 3rd July, 1894.]

Charity—Trust—Will—Deeds not carrying out will—Misapplication of funds—Mistake—Liability of trustee—Limitation—Fraud—Accounts when directed—Discretion of Court to order accounts—Jurisdiction of Court where charity established by will is outside the jurisdiction—Advocate General, right of—Advocate General barred by decree in prior suit brought by trustees of charity—Civil Procedure Code (XIV of 1882), s. 43.

One Bhimsi Ruttonsi, a Jain, died in February 1863, leaving a will. His widow Bai Punjabai (defendant No. 1) obtained letters of administration with the will annexed. The testator died possessed (*inter alia*) of a half share of certain property in Bombay known as the "Bhimpura property." The remaining half share belonged to two other persons, *viz.*, Hirji Dossa and Muddon Tejsi. By his will the testator directed that a moiety of the rental of his half share should be spent on the *sadharm* (charitable or religious) endowment of a temple at Jackhoo in Cutch, and the other moiety thereof in establishing two *sadavarats*, one at Jackhoo and the other in Palitana. He also set apart a sum of Rs. 1,26,000, of which Rs. 1,01,000 were to be expended in building a temple at Jackhoo, and the balance of Rs. 25,000 in erecting a market near the temple at Jackhoo, or, if that was impossible, it was to be spent in Palitana. The plaint complained that of the Rs. 1,26,000 about Rs. 60,000 had been spent in buying a property in Bombay, called the "school property," for the purpose of establishing a school there, and about Rs. 50,000 had been expended in erecting a temple at Jackhoo, but that nothing had been done with the balance, nor had a market been established at Jackhoo. All that had been done there was to erect three shops which cost about Rs. 2,000. The plaint further stated that in 1868 Bai Punjabai (defendant No. 1) had made over the "school property" and the "Bhimpura property" to three trustees on trusts, not strictly in accordance with the testator's will as above set forth. Under this deed the trustees were to apply one moiety of the net rents (1) in *Sadavarat* or alms-giving at Jackhoo and Palitana, ; (2) in feasting the caste people in Bombay and Jackhoo annually; (3) in the worship called *satarbhadi* at the *derasar* (temple) in

* Suit No. 108 of 1892.